Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting Against National Security	)	WC Docket No. 18-89
Threats to the Communications Supply	)	
Chain Through FCC Programs	)	

REPLY COMMENTS

The American Cable Association ("ACA")[1] hereby submits reply comments in this proceeding to advise the Federal Communications Commission against taking overly broad and legally dubious "steps" to regulate communications network supply chains.[2] Whatever authority the Commission may possess as administrator of the Univeral Service Fund (USF), that authority, or any other authority the Commission may have, cannot be read as a mandate to intervene in private agreements between communications providers and their suppliers. As the Commission considers what role

[1] ACA represents approximately 750 smaller cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers. These providers pass approximately 18.2 million households of which 7 million are served.

[2] *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs,* Notice of Proposed Rulemaking, WC Docket No. 18-89, ¶ 31 (rel. Apr. 18, 2018) ("NPRM").

it might play in addressing legitimate national security threats to communications networks and network supply chains, it must remain mindful of the limits of its authority and stay within those limits.

In its Notice of Proposed Rulemaking in this proceeding, the Commission suggests that good stewardship of USF requires it to assume a "specific, but an important, supporting role" in Federal government efforts to promote secure communications networks.[3] Specifically, the Commission proposes to enact a ban on the use of USF dollars for purchase of equipment or services from companies that pose a threat to national security. The bulk of the NPRM concerns implementation details of the proposed ban—the scope of the ban, compliance timelines, enforcement mechanisms, applicability within the different USF programs, and so forth.[4] The NPRM also presents a legal case for the proposed ban, rooted in the Commission's authority under Sections 254 and Section 201(b) of the Communications Act ("Act") to enact rules governing the expenditure of USF dollars.[5]

The Commission vastly expands the scope of the NPRM when it pauses for a single paragraph to ask generally about "steps" it might take to address "non USF-funded equipment and services," including whether it should "consider" such "actions" as "testing regimes, showings, or steps concerning the removal or prospective deployment of equipment."[6] While ACA appreciates the Commission's interest in

[3] *NPRM*, ¶ 2.

[4] *See id*., ¶¶ 13-30, 32-34.

[5] *See id*., ¶¶ 35-36; *see also* 47 U.S.C. §§ 254, 201(b).

[6] *See id*., ¶ 31.

keeping its options open, it strongly advises the Commission not to move forward with any final rules arising from this paragraph of the NPRM. As an initial matter, the pargraph is written in broad, open-ended terms that deny interested parties the opportunity to consider any specific regulatory proposal or range of specific proposals concerning "non USF-funded equipment and services" that may be under consideration. It therefore fails to give adequate notice of any such proposal the Commission may be inclined to adopt.[7] The NPRM also fails to demonstrate any serious consideration, in the Initial Regulatory Flexibility Analysis or elsewhere, of the impact a rule concerning "non USF-funded equipment and services" would have on small providers. At any rate, the generality of the paragraph has yielded a comment record that lacks evidentiary support for the adoption of any such rule.

More fundamentally, neither the Commisson nor any commenting party clearly identifies a legal basis for the Commission to assert control over the multitude of "non USF-funded equipment and services" that supply communications networks, whether through a direct ban on the use of disfavored equipment; mandatory testing or certifications; or any other regulatory measure. Indeed, the single paragraph of the NPRM that contemplates regulation of "non USF-funded equipment and services" does not identify—even as fodder for public comment—any statutory provision that might

[7] *See, e.g., Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d. Cir. 2011) (An agency engaged in notice-and-comment rulemaking under the Administrative Procedure Act "must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.") (internal citations omitted); *see also* Comments of the Telecommunications Industry Association, WC Docket No. 18-89 at 19 (filed June 1, 2018) (advising the Commission not to adopt rules at this juncture that go "beyond USF restrictions") (capitalization omitted).

provide the authority for such regulation.[8] The most straightforward explanation for this omission is that no such authority exists. As commenters in this proceeding aptly note, the Commission's role as USF administrator does not invest it with broad authority over the private agreements by which communications providers procure the equipment and services they need to run their networks.[9] Nor can the Commission rely on Section 201(b) or any other Title II provision as a basis for sweeping regulation of "non USF-funded equipment and services" in the communications network supply chain.[10]

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[8] *See* NPRM, ¶ 31 (seeking comment on "the scope and extent of [the Commission's] legal authority" to take "other steps" contemplated in the paragraph, but not identifying any statutory provision as a potential basis for such authority).

[9] *See* Comments of NCTA—The Internet & Television Association, WC Docket No. 18-89 at 18 (filed June 1, 2018) ("As the NPRM implicitly recognizes, the Commission does not have plenary authority to regulate the communications network supply chain. Accordingly, the Commission should make clear that any rules adopted in this proceeding are simply funding conditions attendant to its congressionally delegated responsibility to administer the award of USF monies to recipients, rather than a reflection of plenary authority over private sector procurement decisions by communications companies."); Comments of USTelecom—The Broadband Association, WC Docket No. 18-89 at 16-17 (filed June 1, 2018) ("The Commission should confine the scope of any rule to apply only to equipment and services funded through the Universal Service Fund in order to stay clearly within the bounds of its legal authority. . . Section 201(b), despite providing the authority to promulgate 'such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act,' cannot be read to provide the Commission with such expansive authority to effectuate a total ban of commerce, lest it become a limitless grant of authority over anything related to communications.") (internal citations omitted).

[10] *See, e.g., Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 33 FCC Rcd 311 (2017) (restoring the classification of broadband Internet access service as an "information service" exempt from common carrier regulation under Title II of the Act).

Respectfully submitted,

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July 2, 2018